

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Implementation of)
Sections 12 and 19 of)
the Cable Television)
Consumer Protection and)
Competition Act of 1992)

Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

MM Docket No. 92-265

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

DISCOVERY COMMUNICATIONS, INC.

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July 28, 1993

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MM Docket No. 92-265

In its Petition for Clarification and Reconsideration ("Petition") of the Commission's First Report and Order implementing the program access provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Act"), Discovery requested the Commission to exempt from the rules program services of an educational or informational nature. Discovery demonstrated that the proposed exemption would further the purposes of the 1992 Cable Act by encouraging the widest possible availability of educational and informational programming.

Discovery also requested the Commission to take other actions that would further the goals of the Act without imposing unnecessary regulatory burdens. In particular, the Commission should: 1) require a distributor to demonstrate harm before requiring alteration of an existing contract; 2) adopt safeguards for protecting confidential information; 3) impose a higher burden on cable operators seeking to make a claim of discrimination; and 4) expressly find that the program access rules are not applicable to marketing and technology experiments and demonstrations.

Discovery submits that these modifications and clarifications to the program access rules will further the purposes of the Act and eliminate burdensome administrative costs. As demonstrated below, the arguments raised in opposition to Discovery's requests are without merit.

II. The Record Supports an Exemption for Educational and Informational Program Services from the Program Access Rules.

One of the overriding themes of the 1992 Cable Act is Congress' desire to promote the development and availability of educational and informational programming. Discovery demonstrated in its Petition that this fundamental goal would be served by adopting the proposed exemption. Commenters who oppose the exemption claim that the statute imposes regulation on all programming in which a cable operator has an attributable interest. The opponents, however, ignore the

Commission's discretion to fashion appropriate rules within the broad statutory framework provided by Congress.

As Discovery has shown, Congress has demonstrated a consistent desire to foster educational and informational programming.¹ The 1992 Cable Act is replete with examples of Congress' intent. For instance, a cable operator is permitted to satisfy a portion of its leased access obligation under Section 9 by providing "qualified educational programming."² Similarly, as noted by DirecTV, Section 25 of the Act requires the Commission to establish rules requiring DBS operators to reserve a portion of their channel capacity for educational and informational programming.³ Elsewhere, Congress has required the Commission to review a television broadcast licensee's efforts to serve the educational and informational needs of children as a condition for renewing its license.⁴ Thus, there can be no doubt that Congress has attempted to foster such programming.

¹ See Discovery Communications, Inc. Petition for Clarification and Reconsideration, MM Docket No. 92-265, (June 10, 1993) ("Discovery Petition").

² See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 9(c) (1992) ("1992 Cable Act").

³ See Opposition of DirecTV, Inc. to Petitions for








The Commission should now take care to fashion its program access rules in a manner that is consistent with the furtherance of this longstanding Congressional objective. Specifically, the Commission should assure that these rules do not needlessly undermine the incentives for production and distribution of educational programming by video networks such as those operated by Discovery. Notwithstanding comments to the contrary,⁵ nothing in the Act prevents the Commission from adopting the proposed exemption. The Commission has wide discretion within the broad bounds of the Act to establish standards for regulations and to determine to whom they shall be applied -- so long as the underlying Congressional objectives are protected and preserved. In the present context, it is the proposed exemption, not a refusal to adopt such an exemption, that is most consistent with Congress' intent.

The exemption clearly would further a stated purpose of the Act -- i.e., promotion of diversity in the information available to the public (especially where that information is educational in nature).⁶ As Discovery has stated in other

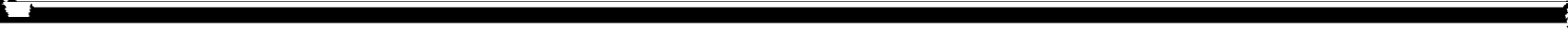








⁵ See Wireless Cable Association International, Inc. Opposition to Petition for Reconsideration, MM Docket No. 92-265 (July 14, 1993), at 21-22 ("Wireless"); Consumer Satellite Systems, Inc. Statement of Opposition to Petition for Reconsideration, MM Docket No. 92-265 (July 12, 1993), at 5 ("Consumer Satellite Systems"); Comments of DirecTV at 13-14.

⁶ See 1992 Cable Act, Section 2(b)(1).

proceedings related to implementation of the 1992 Cable Act, program services of the type that would qualify for the proposed exemption historically have had great difficulty in attracting investment capital from sources outside the cable industry.⁷ During its start-up phase, Discovery failed in its extraordinary efforts to seek venture capital from non-cable sources.⁸ The reason is obvious: educational and informational programming historically has not generated the



benefits. Educational and informational program suppliers cannot offer such programming to non-cable distributors unless the programming exists in the first instance. Exempting such programming from the program access rules will serve the public interest by ensuring that high quality, innovative programming continues to receive the financial



between a distributor's interest in seeking a non-discriminatory price and the administrative and financial burden the rules as adopted would impose on programmers.¹⁰ Commenters opposing Discovery's middle ground contend that a demonstration of harm is not countenanced by the Act.¹¹ This argument is without merit.

As an initial matter, nothing in the Act requires the Commission to impose the program access rules on existing contracts.¹² Indeed, the Commission has recognized that the Act "is silent concerning the enforcement of the anti-discrimination rules with respect to existing contracts."¹³ To the extent that it chooses to do so, the Commission has broad discretion to determine how and under what circumstances the rules shall be applied to such agreements. Thus, the Commission clearly has authority under the Act to require distributors to demonstrate actual harm as a condition to reformation of an existing contract.

¹⁰ See Comments of Discovery at 7-10.

¹¹ See Comments of Consumer Satellite Systems at 4; Comments of Bell Atlantic on Petitions for Reconsideration, MM Docket 92-265, (July 14, 1993), at 6-8; Comments of Wireless at 14-16.

¹² Discovery and others have noted the potential constitutional infirmity of imposing the rules retroactively on existing agreements. See Discovery Comments at 2; Comments of Viacom International Inc., MM Docket No. 92-265 (Jan. 25, 1993), at 30.

¹³ Implementation of the Cable Television Act, 8 F.C.C. Rcd 194, 201 (1992).

Discovery and others have demonstrated the severe hardship that programmers would endure through review of countless contracts.¹⁴ Such review would impose substantial costs without necessarily resulting in reduced prices charged to the complaining distributors. Thus, there is no assurance that, despite the high administrative costs, the rules will achieve any public benefits.

Discovery submits that it is much more reasonable to require a distributor to demonstrate that it has suffered some competitive harm before an existing contract is ordered to be reformed. This balance will ensure that distributors are adequately protected from practices the Act intended to prohibit without imposing unreasonable and unnecessary administrative costs.

IV. The Commission Must Ensure that Proprietary Information is Adequately Protected.

In its Petition, Discovery applauded the Commission's recognition of the need to protect sensitive business information.¹⁵ Discovery also requested that the Commission expressly permit a programmer, upon a proper showing, to restrict access to proprietary information to the

¹⁴ See Discovery Petition at 8; Viacom International Inc. Petition for Reconsideration and Clarification, MM Docket No. 92-265, (June 10, 1993), at 16 ("Viacom Petition").

¹⁵ See Discovery Petition at 6-7; see also, Viacom Petition at 14-15.

complainant's counsel or the Commission's staff.¹⁶ DirecTv takes exception to this request for reasonable safeguards. DirecTv asserts that the complainant's own personnel must have access to the most sensitive information produced in response to a complaint because retained counsel "may not possess the requisite expertise or industry knowledge to make informed judgements as to what information is relevant or important...."¹⁷ The Commission should reject this attempt to gain a business advantage through unfair access to confidential information.

As the Commission is well aware, attorneys, by the nature of their profession, must become expert in a wide variety of fields. There simply is no reason to assume that a company's counsel is unable to grasp the knowledge necessary to build a case on behalf of his or her client. In any event, under Discovery's proposal, the Commission will have the ability to review the disputed documents in camera. Thus, the decision maker will have the benefit of the information sought by the complainant for whatever purpose.¹⁸ Grant of Discovery's request for adequate safeguards will preserve the integrity of sensitive trade information without

¹⁶ See Discovery Petition at 7.

¹⁷ See Comments of DirecTv at 14.

¹⁸ See Opposition of Superstar Connection to Petition for Reconsideration, MM Docket No. 92-265, (July 14, 1993), at 17-18.

imposing any undue burdens on parties seeking to present a complaint under the Act.

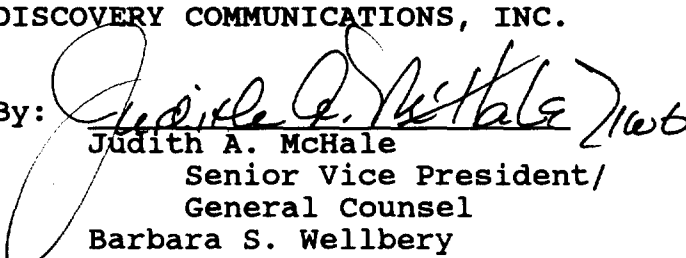
V. Conclusion

Accordingly, Discovery respectfully requests the Commission to reconsider and clarify its program access rules as proposed in Discovery's Petition and herein.

Respectfully submitted,

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July 28, 1993

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